

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RUTH ANDREWS,

Plaintiff,

v.

CAROLYN W. COLVIN,  
Commissioner of Social Security,

Defendant.

No. 1:15-CV-03128-JTR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF No. 14, 15. Attorney D. James Tree represents Ruth Andrews (Plaintiff); Special Assistant United States Attorney Nicole A. Jabaily represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

**JURISDICTION**

Plaintiff filed an application for Disability Insurance Benefits (DIB) on

1 August 29, 2011, alleging disability since December 7, 2009, due to a herniated  
2 neck; back problem, including the low back; severe headaches/concussion; sciatic  
3 nerve; carpal tunnel in both hands with no feeling in the left hand; numbness in the  
4 right leg, the second and third toes on the right foot, and the fourth and fifth fingers  
5 of the right hand; arthritis; broken right collar bone; and right knee problems. Tr.  
6 171-179, 221, 225. The application was denied initially and upon reconsideration.  
7 Tr. 92-94, 96-97. Administrative Law Judge (ALJ) Verrell Dethloff held a hearing  
8 on August 15, 2013 and heard testimony from Plaintiff and vocational expert,  
9 Trevor Duncan. Tr. 55-72. Plaintiff was represented by council. *Id.* The ALJ  
10 issued an unfavorable decision on September 5, 2013. Tr. 30-47. The Appeals  
11 Council denied review on May 27, 2015. Tr. 1-7. The ALJ's September 5, 2013,  
12 decision became the final decision of the Commissioner, which is appealable to the  
13 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial  
14 review on July 20, 2015. ECF No. 1, 4.

### 15 **STATEMENT OF FACTS**

16 The facts of the case are set forth in the administrative hearing transcript, the  
17 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
18 here.

19 Plaintiff was 48 years old at the alleged date of onset. Tr. 173. The last  
20 grade Plaintiff completed was the ninth in 1976. Tr. 226. She last worked in  
21 December 2009 and reported she stopped working because of her condition. Tr.  
22 225.

### 23 **STANDARD OF REVIEW**

24 The ALJ is responsible for determining credibility, resolving conflicts in  
25 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
26 1039 (9th Cir. 1995). The Court reviews the ALJ's denial of benefits *de novo*,  
27 deferring to the agency's reasonable interpretation of the statutes. *McNatt v. Apfel*,  
28 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed

1 only if it is not supported by substantial evidence or if it is based on legal error.  
2 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
3 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
4 1098. Put another way, substantial evidence is such relevant evidence as a  
5 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
6 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one  
7 rational interpretation, the court may not substitute its judgment for that of the  
8 ALJ. *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial  
9 evidence will be set aside if the proper legal standards were not applied in  
10 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
11 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence  
12 supports the administrative findings, or if conflicting evidence supports a finding  
13 of either disability or non-disability, the ALJ's determination is conclusive.  
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

### 15 SEQUENTIAL EVALUATION PROCESS

16 The Commissioner has established a five-step sequential evaluation process  
17 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*  
18 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
19 proof rests upon the claimant to establish a *prima facie* case of entitlement to  
20 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a  
21 claimant establishes that physical or mental impairments prevent her from  
22 engaging in her previous occupations. 20 C.F.R. § 404.1520(a)(4). If a claimant  
23 cannot do her past relevant work, the ALJ proceeds to step five, and the burden  
24 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
25 other work, and (2) specific jobs exist in the national economy which the claimant  
26 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194  
27 (2004). If the claimant cannot make an adjustment to other work in the national  
28 economy, a finding of "disabled" is made. 20 C.F.R. § 404.1520(a)(4)(v).

**ADMINISTRATIVE DECISION**

On September 5, 2013, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since December 7, 2009, the alleged date of onset. Tr. 32.

At step two, the ALJ determined Plaintiff had the following severe impairments: cervical and lumbar degenerative disc disease, carpal tunnel syndrome status post release, mild left cubital tunnel syndrome, and mild right ulnar neuropathy. Tr. 32.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 34.

At step four, the ALJ assessed Plaintiff's residual function capacity and determined she could perform a range of light work with the following limitations:

[S]he is able to stand or walk for 6 hours in an 8-hour workday as well as sit for 6 hours in an 8-hour workday; she is able to push and pull within these limits; she is able to frequently climb (ramps, stairs, ladders, ropes, and scaffolds), frequently stoop, occasionally reach overhead, and occasionally finger. She must avoid concentrated exposure to extreme cold, extreme heat, and hazards.

Tr. 34-35. The ALJ identified Plaintiff's past relevant work as an agricultural produce sorter and sales clerk. Tr. 44. He concluded that Plaintiff was able to perform this past relevant work. *Id.*

As an alternative to a step four denial, the ALJ made a step five determination that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the jobs of counter clerk and sandwich board carrier. Tr. 45-46. The ALJ concluded Plaintiff was not under a disability within

1 the meaning of the Social Security Act at any time from the alleged date of onset,  
2 December 7, 2009, through the date of the ALJ's decision, September 5, 2013. Tr.  
3 46.

## 4 ISSUES

5 The question presented is whether substantial evidence supports the ALJ's  
6 decision denying benefits and, if so, whether that decision is based on proper legal  
7 standards. Plaintiff contends the Appeals Council erred by failing to consider the  
8 opinion of Anthony E. Francis, M.D., and the ALJ erred by (1) failing to properly  
9 consider Plaintiff's testimony about the severity of her symptoms, and (2)  
10 presenting an inaccurate hypothetical to the vocational expert.

## 11 DISCUSSION

### 12 A. The Opinion of Anthony E. Francis, M.D.

13 Plaintiff argues that this Court should consider the opinion of Dr. Francis  
14 and that the Appeals Council failed to properly consider the opinion prior to  
15 denying Plaintiff's request for review. ECF No. 14 at 7-9. Defendant does not  
16 challenge Plaintiff's assertion that this Court should consider Dr. Francis' opinion,  
17 but argues that even with the opinion, substantial evidence still supports the ALJ's  
18 decision. ECF No. 15 at 11-17.

19 It is well established that "when a claimant submits evidence for the first  
20 time to the Appeals Council, which considers that evidence in denying review of  
21 the ALJ's decision, the new evidence is part of the administrative record, which the  
22 district court must consider in determining whether the Commissioner's decision is  
23 supported by substantial evidence." *Brewes v. Comm'r of Soc. Sec. Admin.*, 682  
24 F.3d 1157, 1159-1160 (9th Cir. 2012). Indeed, this additional evidence is relevant  
25 "so long as it relates to the period on or before the ALJ's decision." *Id.* at 1162  
26 (citing 20 C.F.R. § 404.970(b)).

27 On September 1, 2014, after the ALJ's decision, Dr. Francis reviewed the  
28 medical records available to the ALJ at the time of his decision, and opined that

1 Plaintiff “has bilateral upper multiple extremity pathology . . . and equals 1.02 B  
2 since the AOD of [12/07/09] on a more likely than not basis.” Tr. 772.

3 Dr. Francis’s opinion was not available for review for the ALJ’s September  
4 5, 2013, opinion, Tr. 48-52, but it was associated with the record by the Appeals  
5 Council, Tr. 6. Despite associating the evidence with the record, the Appeals  
6 Council failed to discuss Dr. Francis’ report. It simply stated that “we considered  
7 the reasons you disagree with the decision and the additional evidence listed on the  
8 enclosed Order of Appeals Council.” Tr. 2. Plaintiff asserts that this constitutes an  
9 error on the part of the Appeals Council for failing to properly consider the opinion  
10 prior to denying review. ECF No. 14 at 8. While, this Court agrees that the  
11 Appeals Council’s silence regarding Dr. Francis’ opinion potentially runs afoul of  
12 20 C.F.R. § 404.1527(c), stating that “[r]egardless of its source, we will evaluate  
13 every medical opinion we receive,” this Court does not have jurisdiction to review  
14 a decision of the Appeals Council denying a request for review of an ALJ’s  
15 decision, because such a decision is a non-final agency action. *Taylor v. Comm’r*  
16 *of Soc. Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011); *Brewes*, 682 F.3d at  
17 1159-1160.

18 Instead, this Court presumes that the Appeals Council considered Dr.  
19 Francis’ opinion because it was associated with the record. The opinion thus  
20 becomes part of the body of evidence this Court considers when evaluating  
21 whether substantial evidence supports the ALJ’s decision. *Brewes*, 682 F.3d at  
22 1162. Sometimes a decision that was supported by substantial evidence at the ALJ  
23 stage could cease to be supported by substantial evidence after the Appeals  
24 Council’s denial of review. *Id.* at 1163; *Taylor*, 659 F.3d at 1232.

25 Here, the ALJ determined that Plaintiff did not meet or equal listing 1.02.  
26 Tr. 34. The ALJ found that Plaintiff was “able to use her arms and hands  
27 effectively, including daily tasks like cooking, cleaning, and emailing.” *Id.* In  
28 coming to this determination, he gave great weight to the opinion of Dr. Hurley, a

1 nonexamining physician, who reviewed the evidence in the record as of January  
2 10, 2012, stating “[t]here are no other probative medical opinions in the record that  
3 contradict Dr. Hurley’s assessment.” Tr. 40-41, 86-89. Dr. Hurley, based on the  
4 limited record he had, opined Plaintiff did not meet or equal listing 1.02. Tr. 86-  
5 87. In contrast, Dr. Francis formed his opinion after reviewing all of the records  
6 that were before the ALJ at the time of his decision. Tr. 772-773. Additionally,  
7 Dr. Francis’ opinion summarized the objective medical evidence in the file,  
8 supporting his conclusion that Plaintiff’s ability to perform fine and gross  
9 movements were impaired and that Plaintiff equaled listing 1.02. *Id.* Considering,  
10 the ALJ’s determination failed to address the objective medical evidence in coming  
11 to his step three determination, it was based on the opinion of a nonexamining  
12 physician who did not review all the records, and a nonexamining physician who  
13 did review all of the medical records came to an alternative conclusion, the ALJ’s  
14 step three determination is not supported by substantial evidence.

15 Therefore, the case is remanded for additional proceedings for the ALJ to  
16 make a new step three determination, and in doing so to consider and weigh the  
17 opinion of Dr. Francis.

## 18 **B. Credibility**

19 Plaintiff contests the ALJ’s adverse credibility determination in this case.  
20 ECF No. 14 at 9-14.

21 It is generally the province of the ALJ to make credibility determinations,  
22 *Andrews*, 53 F.3d at 1039, but the ALJ’s findings must be supported by specific  
23 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
24 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
25 testimony must be “specific, clear and convincing.” *Smolen v. Chater*, 80 F.3d  
26 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

27 Here, the ALJ stated that he applied a “reasonableness” standard in forming  
28 his credibility determination in accord with regulatory guidelines. Tr. 36. Despite



1 the regulatory guidelines referred to by the ALJ, the Ninth Circuit has consistently  
2 held that absent evidence of malingering, the ALJ must provide “specific, clear and  
3 convincing” reasons for rejecting Plaintiff’s testimony. *Smolen*, 80 F.3d at 1281;  
4 *Tommasseti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Garrison v. Colvin*,  
5 759 F.3d 995, 1014-1015 (9th Cir. 2014).

6 Considering the case has been remanded for additional proceedings, the ALJ  
7 is instructed to conduct a *de novo* hearing and reconsider Plaintiff’s credibility  
8 applying the correct standard for the Ninth Circuit.

### 9 **C. Inaccurate Hypothetical Question**

10 Plaintiff argues the ALJ erroneously relied on the opinion of the vocational  
11 expert when that opinion was based on an inaccurate hypothetical. ECF No. 14 at  
12 15-16.

13 An ALJ is only required to present the vocational expert with those  
14 limitations the ALJ finds to be credible and supported by the evidence. *Osenbrock*  
15 *v. Apfel*, 240 F.3d 1157, 1165-1166 (9th Cir. 2001). Considering the case is being  
16 remanded for the ALJ to consider Dr. Francis’ opinion, the ALJ is instructed to  
17 hold a *de novo* hearing to consider the entire record at steps one through five.  
18 Should a step four or five determination be necessary, the ALJ is instructed to elicit  
19 testimony from a vocational expert.

### 20 **REMEDY**

21 The decision whether to remand for further proceedings or reverse and  
22 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
23 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
24 where “no useful purpose would be served by further administrative proceedings,  
25 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
26 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
27 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
28 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)



(noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to consider the opinion of Dr. Francis. In doing so, the ALJ is instructed to hold a *de novo* hearing addressing step three, Plaintiff’s credibility, and, if necessary, Plaintiff’s residual functional capacity. The ALJ is instructed to supplement the record with any outstanding medical evidence; take testimony from an orthopedic medical expert regarding whether or not Plaintiff meets or equals a listing and, if not, to narrate a residual functional capacity opinion; and to take testimony from a vocational expert if a step four or five determination is necessary.

### CONCLUSION

Accordingly, **IT IS ORDERED:**

1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.

2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for additional proceedings consistent with this Order.

3. Application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**

1 and the file shall be **CLOSED**.

2 DATED July 11, 2016.

A handwritten signature in black ink, appearing to be "M" followed by a stylized flourish.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE